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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR ROCHA,

Defendant and Appellant.

D054748

(Super. Ct. No. RIF116271)

APPEAL from a judgment of the Superior Court of Riverside County, Janice M. McIntyre and Stephen Graham, Judges. (Retired judges of the Riverside County Superior Court, and Marin County Superior Court, respectively, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

A jury convicted Cesar Rocha of possession of a controlled substance for sale (Health & Saf. Code, § 11378; count 1); two counts of willful harm or injury to a child

(Pen. Code,<sup>1</sup> § 273a, subd. (a); counts 2 & 3); possession of a firearm by a felon (§ 12021, subd.(a)(1); count 4); possession of ammunition by a felon (§ 12316, subd. (b)(1); count 5), and being under the influence of methamphetamine (meth), a misdemeanor (Health & Saf. Code, § 11550, subd. (a); count 6).<sup>2</sup> Rocha additionally admitted to having suffered a prior felony conviction that qualified as a strike (§§ 667, subd. (b)-(i), 1170.12).<sup>3</sup> The trial court sentenced Rocha to a total prison terms of eight years.

On appeal, Rocha claims the trial court erroneously denied his pretrial motions to suppress evidence and to sever counts 4 and 5 for trial. We affirm.

### BACKGROUND

On April 9, 2004, Riverside Police Department (RPD) Detective Senon Saldana and several other officers executed a search warrant at Rocha's residence in Riverside where Rocha lived with his two minor children, codefendant Contreras, his brother Judas Rocha, and several other people who rented rooms from him. As the officers approached the front door of the house, they noticed the garage door open and observed Rocha and another person walking back and forth in the living room. As soon as Rocha saw the officers, he turned and ran to the back of the house, with Saldana running through the house after him toward the northwest bedroom, where Rocha locked himself inside.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> The jury also returned verdicts against Rocha's codefendant, Magdalena Privett Contreras, who is not a party to this appeal.

<sup>3</sup> An alleged prison prior was dismissed in limine by the court.

After identifying himself, and hearing the toilet flush, Saldana kicked the bedroom door open and observed Rocha attempting to dispose of something in the connecting bathroom's sink.

When Rocha came out of the bathroom, Saldana detained and searched him, finding a glass meth pipe in his front pants pocket, a black plastic gram scale in a rear pocket, and \$445 in cash in his wallet. Saldana, along with other officers, then searched the bathroom and bedroom where Rocha had fled. Saldana found a torn plastic baggie on top of the bathroom sink and "shards" or "particles" of what appeared to be meth in and under the sink and on the toilet seat. He also found a slightly torn plastic baggie containing a "brownish crystalline substance," which he suspected was meth, on top of the medicine cabinet and a small bag containing marijuana inside a bathrobe hanging in the bathroom. In the bedroom, other officers found a glass smoking pipe under a pillow on the bed, a set of keys on a table containing a key to the padlock for the shed located behind the house, and "miscellaneous paperwork" that bore Rocha's and Contreras's names.

Inside another room, Saldana and other officers recovered a box of plastic sandwich baggies, recognized as items used by "street-level drug dealers" to pack narcotics and, in a front bedroom, a probation officer who was part of the search team found a marijuana bud, and what was characterized as a "pay/owe sheet." Traffic court paperwork addressed to Rocha was also found in the same room.

RPD Detective Matthew Lackey, who also assisted in the search of Rocha's residence, noticed a storage shed and children's bikes and toys in the backyard. Walking

near the shed, Lackey could see what appeared to be the "butt stock" of a rifle draped with clothing through the locked black metal security screen. He forced open the door and confirmed the item he saw was a rifle. In all, he found a Chinese SKS semiautomatic assault rifle, two 12-gauge pump-action shotguns, a .30 caliber carbine M-1 type rifle, as well as a "green ammo can" that contained "miscellaneous ammunition," "magazines," and boxes of shotgun shells. Although none of the weapons found were loaded, there were no locks on any of them and they were not secured.

In addition, while searching the home, the officers found four children, two of them Rocha's, watching television in one of the back bedrooms. At the conclusion of the search, the children were released to three adults who were in the home at that time and Rocha, who appeared to be under the influence of drugs, was transported, along with several other people, to the police station.

At the station, Saldana and another detective interviewed Rocha who, after waiving his constitutional rights, admitted he was under the influence and had run to the house's back bathroom, after seeing the approaching officers, to dispose the meth in several plastic baggies in the sink and toilet. He conceded he regularly used meth, but denied he sold the drug.

Also during the interview, Rocha initially denied any knowledge about the weapons found inside the backyard shed, but eventually admitted that he had handled one of the rifles found there four to six weeks before the search. Rocha claimed that one of the renters in the home built and owned the shed and owned its contents. Rocha denied

having a key to the shed and could not explain how one would have been found in his bedroom during the search.

In addition to the above evidence being presented at trial, Saldana opined that Rocha possessed the meth found during the search, which was approximately 20.5 grams in total, for purposes of selling it. A drug expert confirmed this opinion and also testified that most homes where drugs are trafficked contain protective weapons and children in such homes are subject to substantial danger of drug exposure, violence and neglect.

Lackey further testified with regard to the shed that there was no need for him to pry open its door because it was possible that someone, even a child, could have reached through and unlocked it. Lackey found nothing in the shed to indicate who owned it or the recovered items.

The parties stipulated that a triple balance scale containing meth residue on its top was found during the search in Rocha's brother's bedroom and that blood samples drawn from Rocha indicated he was under the influence of meth at the time of his arrest. The parties also agreed that the jury could be instructed Rocha was an ex-felon for purposes of counts 4 and 5, being a felon in possession respectively of a firearm and ammunition.

#### *The Defense Case*

On Rocha's behalf, his brother and several renters in the residence testified that the weapons and ammunition found inside the shed built and owned by one of the renters belonged to Rocha's brother who had stored them in the shed under a blanket shortly before the search. The shed was always locked and Rocha did not have keys to the shed.

By the time of trial, both Rocha's brother and the renter who owned the shed had federal felony convictions for unlawful possession of the weapons.

Pertaining to the drugs and documents found in the search of the residence, Rocha's brother said Rocha usually slept in the room where the pay/owe sheets were found and that codefendant Contreras slept in the back bedroom connected to the bathroom where the drugs were actually found. One of the renters, however, testified that Contreras and Rocha often shared their bedrooms and the connecting bathroom. A toxicologist, who had reviewed the prosecution's test results of the substances found in the home and his own laboratory's retesting, opined that only a small portion of the substances tested under its protocol, which was different than that used by the Department of Justice laboratory, was of the quality sufficient to be considered meth.

## DISCUSSION

### I

#### *MOTION TO TRAVERSE THE SEARCH WARRANT*

Four months after the preliminary hearing, Rocha brought a motion under section 1538.5 to traverse the affidavit in support of the search warrant that had been issued to search his residence and to suppress all the evidence found during that search on the ground the affidavit was defective due to material omissions. In support of the motion, Rocha filed a copy of the search warrant, a copy of the return to the search warrant, Saldana's affidavit in support of the search warrant, a defense investigator's interview with Edna Mae Andrews, the citizen informant who provided information for Saldana's affidavit, Andrews's verification that the statements made in the investigator's interview

with her were "true and correct" based on "her own personal knowledge," and a copy of Andrews's felony record from 2003. The prosecution opposed the motion.

At the hearing on the matter, Rocha's counsel claimed there was a prima facie showing of omissions from Saldana's affidavit in support of the search warrant because the informant Andrews "was busted for a violation of probation. She was threatened with prison incarceration unless she cooperated in the preparation of the search warrant by participating in a controlled buy for Mr. Rocha's residence, so she cooperated. [¶]

The . . . sworn affidavit seems to indicate only to the Court that the informant is somebody who has a felony conviction and is on probation and in all other senses is cooperating for no reason other than a desire to clean up Riverside of its drug problem. I think it's a completely different thing from what I have in a declaration from the informant here who is present, and I think that a magistrate at a minimum would have had questions of an officer presenting an affidavit had the facts of [Andrews's] arrest and her motivation to cooperate in this controlled buy been set forth truthfully in the affidavit."

The prosecutor did not believe the defense had met the standard required to traverse the motion, asserting Rocha was merely attacking the credibility of the informant and not that of the affiant for the search warrant. The prosecutor argued that even if the information proffered by Rocha were true, such would not have effected the validity of the warrant in this case.

The judge hearing the motion found the defense had met its initial threshold to "at least . . . inquire as to what information. And this is an omission, as I understand, that

you are talking about." The judge noted her concern "about any incentives expressed to the informant that would cause her to cooperate with law enforcement that were not in the warrant." The judge was also interested in what the affiant knew in regard to any information to be included in the search warrant and about whether any promises were made to the informant regarding prosecution or nonprosecution about any contraband found in her house as an inducement for her to cooperate with authorities.

Saldana then testified at the hearing, explaining that he and another RPD detective were called by Probation Officer Mel Dittemore to meet with Andrews, who was a probationer on his caseload, who could provide them with some information that would assist in preparing a search warrant. Before the officers talked alone with Andrews, they ran a records check of Rocha's address, which turned up his and his brother's names as people who had previously been arrested from that location. When the officers asked Andrews why she wanted to provide information, she stated "she wanted to clean up her act and wanted to help [the officers] out with taking somebody down who is selling a lot of . . . [meth]." At that time, Saldana had no knowledge that Andrews might have any new criminal charges pending against her and she did not tell them anything about drugs being found in her house, that she was trying to work off any charges, or that she had been threatened in any way. Saldana said he would have included such information in his affidavit in support of the search warrant had he known about any pending probation violation.

On cross-examination, Saldana further explained that the meeting with Andrews occurred "roughly" 15 to 20 minutes before she participated in a controlled buy for



purposes of the search warrant. After the interview with her, the officers had driven Andrews to a designated location where she was searched and given \$20 in undercover funds before she walked to Rocha's residence to do the controlled buy under their continued surveillance.

In response to defense counsel's questions, Saldana noted he had included in the affidavit information Andrews had told the officers about her currently being on felony probation for "sales of dope" and that she had previously done "hand-to-hand drug transactions" with both Rocha and his brother, but that Rocha was "the main supplier of [meth] on the east side of Riverside" and sold meth to her from his residence.

Andrews next testified at the hearing that she had been convicted on August 6, 2003 of possession of rock cocaine for sale and placed on five-years felony probation. In March 2004, her probation officer, Dittemore, had found "\$60 worth of [meth] and a pipe" in her bedroom during a probation search. Andrews said she had been very upset and crying at the time because she was on psychiatric medications and was really concerned about what would happen to her autistic son. At some point Andrews was handcuffed and Dittemore talked to her about "going to jail [and her] violation." It was her impression he intended to take her to jail because of the handcuffs and his telling her she was going downtown. Dittemore mentioned that if Andrews gave him information about where she got her drugs, she could stay and they would work something else out. Andrews told Dittemore that she got the drugs from a "homey around the way" and eventually mentioned Rocha's name. Andrews was then unhandcuffed and Dittemore said he would be in contact with her.

About a week later, Dittmore called Andrews and discussed a plan to have her call Rocha to arrange for him to bring drugs to her house for a controlled buy so that he could be arrested. Even though Dittmore had told Andrews that Rocha would be stopped in his car on the way to her house because of his expired registration tags, she declined to participate in the plan because she was afraid Rocha would figure out it was her who had tipped off the police, and she was also concerned Rocha might have his son in the car and she did not want Rocha arrested in front of him. Dittmore purportedly indicated he would come up with another solution and she should wait to hear from him.

The next week, Dittmore called Andrews again and had her come to his office, where she did a drug test and was informed that she would be questioned by some detectives. Andrews claimed that Dittmore told her when she talked with them she should act like she did not know Rocha that well even though she had known him for eight years. Andrews said she was questioned by the detectives, one of whom was Saldana, in the room next to her probation officer's office, but thought Dittmore was present during the questioning.

When asked directly whether Dittmore ever indicated to her what would happen if she did not cooperate with the detectives in busting Rocha, Andrews replied, "Not directly. I just figured that I would end up going to jail if I didn't. That was the impression that I was given." Andrews stated she cooperated "to save [her] own skin." Although she never had to go to court or anything on the probation violation, Andrews thought she would "get house arrest or something because that's what [Dittmore had] indicated, that [she would] probably get house arrest or get some kind of drug rehab, and

he never followed through." When one of the detectives asked Andrews if she was working with them to get out of trouble, she looked at Dittimore who then said she was "just a concerned citizen." Andrews said she agreed with this statement. Eventually, Andrews was sent to Rocha's house with money and made a drug purchase.

When cross-examined about the document she had signed under oath while sitting in codefendant Contreras's car with a defense investigator, she claimed everything in it was true but then retracted various statements, conceding she had not noticed certain statements were not true when she had read the document over before signing. As far as Andrews knew, the detectives did not know she had "a felony or anything," but guessed they knew because Dittimore had talked with them before they came to the probation officer's office to talk with her. Andrews denied she had told the detectives that Rocha was a major supplier of meth, claiming that she only knew about Rocha because she had visited several women who lived at his residence.

At the end of the evidence, the court asked counsel for further comments. Rocha's counsel essentially complained that there was insufficient evidence for the court to render a fair decision on the motion because Dittimore had not testified. Nonetheless, counsel essentially claimed that Dittimore's acting beyond the scope of his duties as a probation officer to set up a controlled buy with Andrews and Saldana's failure to ask appropriate questions of Dittimore and Andrews about her criminal record or past "misdeeds," so that Saldana would be a "clean affiant who [could] testify truthfully [he] was never told," with everyone playing ignorant made a "mockery of the search warrant process. . . ." Counsel thought that Dittimore's knowledge of Andrew's recent probation violation and the fact

no action had been taken against her because she cooperated in the controlled buy were reckless omissions that should be imputed to Saldana so that they would be included in the affidavit to be read again for probable cause on the granting of the motion.

The prosecutor responded by pointing out various falsehoods and ambiguities between Andrew's testimony at the hearing and the statements in the document she signed as being true, claiming she was not very credible, and by explaining that even though Dittemore was a member of a drug enforcement team in Riverside, he was Andrews's probation officer who had discretion in dealing with her and in deciding whether he was going to give her a second chance. The prosecutor noted that the facts Andrews had a felony conviction and was on probation were "divulged to the magistrate" and that the defense in bringing this motion to traverse had conceded "the sufficiency of the contents of the warrant to provide probable cause for its issuance." The prosecutor's bottom line was that Saldana was an honest witness who told the court there were no falsehoods or omissions, negligent or otherwise, to his affidavit and that the court should therefore deny the motion.

The court agreed, stating:

"Based on the testimony of the informant, [the] probation officer never specifically told her that she was working off any conviction violation of probation or any possible new charge. [T]herefore her suspicion was not told to the affiant. Therefore, there's no information that was negligently omitted by the affiant or any misrepresentations included in the warrant. [¶] Further, the informant herself admits that her probation officer never explained that to her as well. So there's nothing that the probation officer should have told the affiant that should have been placed in the declaration for the affidavit [in support of the search warrant]. So therefore the motion is denied."

On appeal, Rocha contends the trial court erroneously denied his motion to traverse the search warrant because Saldana deliberately and recklessly omitted material information from the affidavit, which he should have known in support of the search warrant. Rocha argues that because Saldana identified Andrews in the search warrant affidavit as a citizen informant rather than a confidential reliable informant such represented her in a substantially misleading light that tainted the affidavit and the inclusion of the true facts regarding the pressure on her to cooperate due to her criminal involvement would have altered a reasonable magistrate's probable cause determination. We conclude the trial court properly denied Rocha's motion to traverse.

*A. Applicable Legal Principles*

The United States Supreme Court in *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*), "held that a defendant may challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower courts must conduct an evidentiary hearing if a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to justify a finding of probable cause. At the evidentiary hearing, if the statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that

warrant must be suppressed. [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297 (*Bradford*).)

In addition to challenging a facially valid search warrant affidavit on the ground it contains deliberate misstatements, such affidavit may be attacked on grounds that there are material omissions. (*People v. Kurland* (1980) 28 Cal.3d 376, 383-384 (*Kurland*).) Omissions are considered material "if their [absence] would make the affidavit substantially misleading" or "if there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." (*Id.* at p. 385.) However, an officer preparing an affidavit in support of a search warrant "need not disclose every imaginable fact however irrelevant. [He] need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present." (*Id.* at p. 384.)

Because a search warrant affidavit is presumed valid (*Franks, supra*, 438 U.S. at p. 171), the burden of showing that the alleged omissions in the affidavit were material to the probable cause determination is upon the defendant who challenges the validity of a search warrant on grounds it is based upon an affidavit containing omissions. (*Bradford, supra*, 15 Cal.4th at p. 1297.) " Pursuant to [California Constitution, article I,] section 28[, subdivision] (d), materiality is evaluated by the test of *Illinois v. Gates* (1983) 462 U.S. 213 [*Gates*] . . . which looks to the totality of the circumstances in determining whether a warrant affidavit establishes good cause for a search. [Citation.]" [Citation.]" (*Ibid.*)

Generally, a trial court's express or implied factual findings after a *Franks* hearing will be upheld if they are supported by substantial evidence. (*People v. Costello* (1988) 204 Cal.App.3d 431, 441.) The power to evaluate the credibility of witnesses, resolve any testimonial conflicts, weigh the evidence and draw factual inferences rests with the trial court alone. (*People v. Arango* (1993) 12 Cal.App.4th 450, 452-453.) On appeal, we presume in favor of the trial court's proper exercise of its authority. (*Id.* at p. 453.)

#### B. *Analysis*

Here, the trial court conducted a *Franks* evidentiary hearing essentially finding based on Rocha's counsel's representations and Andrews's statements she averred were true in her declaration in support of the motion, that Andrews may have cooperated in the controlled drug buy because she was either promised leniency for doing so or under duress to do so to avoid going to prison for a violation of her probation. However, after hearing testimony from Saldana and Andrews, the court specifically found that Andrews by her own testimony had not been promised anything or threatened in any way for her cooperation by her probation officer, that Andrews had not relayed any such information or suspicion of such to Saldana, and that Saldana therefore could not have negligently omitted that information from the affidavit. In so finding, the court impliedly found Saldana a credible witness and Andrews not one.

Although we defer to the court's credibility determinations, our review of the record of the evidentiary hearing fully supports those determinations as well as the court's above findings. That Andrews believed she would face a prison term or lose her child if she did not cooperate with the detectives in the controlled buy appear to be assumptions

in her own mind and which she conceded her probation officer never explicitly said to her. Because Andrews's testimony under oath at the evidentiary hearing was different in many respects from her statements made to the defense investigator for the declaration in support of the motion, the court could have easily found Andrews's credibility suspect on this record.

Moreover, because Saldana had already included in the affidavit in support of the search warrant that Andrews was on probation for a felony, that she was "familiar with the use, packaging, and sales of [meth]," that she had used and bought meth "on numerous occasions," and that she had specifically been at Rocha's residence a week to 10 days before the search warrant was sought and had seen Rocha and his brother actively engaged in the sales of meth, we cannot find that the alleged omission, even if true, would have placed Andrews in a substantially different light or one that would have altered a reasonable magistrate's probable cause determination in this case. (*Kurland, supra*, 28 Cal.3d at p. 385.)

Although Andrews was referred to as a "citizen informant" in the affidavit rather than as a "confidential informant," the critical information included in the affidavit about her felony conviction, probation status, and multiple uses of meth, clearly informed the magistrate that she was not an "innocent" citizen informant. As our high court has recognized, police informants "frequently have criminal records and a history of contact with the police[, and often] are themselves the focus of pending criminal charges or investigations." (*Kurland, supra*, 28 Cal.3d at p. 393.) That being so, "[a]ll familiar with law enforcement know the [information] they provide may reflect their vulnerability to



police pressure or may involve revenge, braggadocio, self-exculpation, or the hope of compensation." (*Ibid.*) Consequently, Rocha has not met his burden of showing that the alleged omission would have been material to the magistrate's probable cause determination.

In sum, based on the totality of the circumstances, Rocha has failed to show there was any information omitted from the affidavit or that the alleged omission was material. The trial court properly denied his motion to traverse.

## II

### *MOTION TO SEVER COUNTS 4 AND 5*

In limine, Rocha filed a motion to sever counts 4 and 5 from the information on grounds those charged crimes for possession, respectively, of a firearm and ammunition by a felon were improperly joined with the remaining drug and related child endangerment charges because they were not connected together in their commission, were not different statements of the same offense and were of a different class of crimes. He additionally argued the main count 1 drug charge was supported by stronger evidence, which was being improperly used to bolster counts 4 and 5 and there was no cross-admissible evidence between the drug related counts and counts 4 and 5. Rocha claimed that a "unitary trial" on all offenses together would thus violate his due process and fair trial constitutional rights.

At the hearing on the matter, in reply to the court's inquiry as to whether there was anything to add to the motion papers, defense counsel stressed that "a mere date in and of itself is not sufficient to connect . . . the offenses together." Counsel thought this was a

classic case where the stronger evidence regarding the drug and child endangerment charges were being used to bolster the weaker evidence charges because the locked shed in Rocha's backyard and the guns and ammunition found inside it belonged to other people. The only evidence against Rocha for counts 4 and 5 was that he was the landlord of the owner of the shed and the guns from which it could possibly be argued he had constructive possession of them. Counsel thus argued there was no cross-admissibility of evidence for those crimes, which were not of the same class as the drug and child endangerment crimes.

In response, the prosecutor pointed out that the defense had failed to inform the court that a key to the locked shed had been found during the search of Rocha's residence in his own bedroom. The prosecutor also proffered there would be officer testimony at trial that during the search for drugs at the residence, children's toys were found near the shed and that the shed, even if locked, could be opened by anyone, including a child, reaching through the gate and unlocking the door without a key. The prosecutor argued that the "larger picture of what's going on" at Rocha's house was that the presence of the drugs, guns and ammunition mixed with people being under the influence combined to create a hazardous situation for the children there.

The trial judge denied the motion, stating:

"Sounds like under [section] 954 this substantial judicial economy considered here in trying the matter together in that the discovery was all part of the same activity. And I haven't heard anything that indicates to me there's substantial prejudice to the defense in presenting that evidence or the evidence on the other charges. [¶] Additionally, [the prosecutor] explained that the presence of the weapons, at least per his understanding and what he expects to

prove, is part of the basis for the child endangerment charges. So, the motion to sever is denied as to all which I think qualifies."

On appeal, Rocha contends the trial court abused its discretion in denying his motion to sever counts 4 and 5 for basically the same reasons as raised below, and argues that such error manifestly prejudiced his rights to due process and a fair trial. We disagree.

*A. The Pertinent Law*

Under section 954, "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." However, even when the statutory requirements for permissive joinder are met, severance of the charges may be constitutionally required if joinder "would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.)

Because the joinder of related charges, " 'whether in a single accusatory pleading or by consolidation of several accusatory pleadings, ordinarily avoids needless harassment of the defendant and the waste of public funds which may result if the same general facts were to be tried in two or more separate trials [citation], and in several respects separate trials would result in the same factual issues being presented in both

trials," the law prefers consolidation of charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) If the requirements for joinder under section 954 are met, a defendant must then make "a clear showing of potential prejudice" due to the consolidation of such properly joined counts to establish error in the denial of a motion to sever. (*Bradford, supra*, 15 Cal.4th 1229, 1315.)

Generally, the denial of a severance motion is reviewed for abuse of discretion and the ruling will be reversed only if the court has abused its discretion. (*People v. Osband* (1996) 13 Cal.4th 622, 666.) Such an abuse of discretion may be found when the court's ruling " 'falls outside the bounds of reason.' " (*Ibid.*) "[T]he propriety of a ruling on a motion to sever counts is judged by the information available to the court at the time the motion is heard." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284.)

" ' "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." ' [Citation.]" (*Bradford, supra*, 15 Cal.4th at p. 1315.) Whether joinder of properly joined counts would cause prejudice depends on the circumstances of each case, "but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) The denial of a severance motion "may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the

charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173 (*Sandoval*), distinguished on another point in *People v. Lewis* (2001) 26 Cal.4th 334, 390.)

These criteria, however, are not "equally significant." (*Bradford, supra*, 15 Cal.4th at p. 1315.) " '[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible . . . in separate trials on the others.[<sup>4</sup>] If so, any inference of prejudice is dispelled.' [Citations.] Cross-admissibility suffices to negate prejudice, but is not essential for that purpose. Although " '[our Supreme Court has] held that cross-admissibility ordinarily dispels any inference of prejudice, [it has] never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice.' " [Citation.]" (*Id.* at pp. 1315-1316; fn. added.)

Finally, "[e]ven if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

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<sup>4</sup> Although evidence of other crimes is not cross-admissible to establish a disposition to commit crimes under Evidence Code section 1101, it is admissible to establish other relevant facts, including intent, motive, knowledge, or identity. (Evid. Code, §1101, subd. (b).)

## *B. Analysis*

In this case, as the trial court correctly found at the time of the motion, the statutory requirements for joinder were met. The evidence then before the court revealed that a search warrant had been served on Rocha's residence and during the search drugs, weapons, adults under the influence of drugs, as well as children, were found thus connecting the offenses stemming from their discovery together in their commission. (See § 954.) The prosecutor at the hearing additionally proffered that both the drugs and weapons found during the search were the basis of prosecuting the two child endangerment charges. As Rocha reluctantly acknowledges in his opening brief, the evidence related to the weapons and ammunition found in the shed was thus at least cross-admissible to the child endangerment charges thereby dispelling any inference of prejudice. (*People v. Carter* (2005) 36 Cal.4th 1114, 1154.)

In addition, as the trial court also noted, judicial economy would be served by joinder of all charges in this case because the same discovery generally pertained to each charge and the same officers executing the search warrant on Rocha's residence would necessarily be witnesses concerning that search and the contraband found there even if separate trials were held.

Contrary to Rocha's assertion, there was a possibility of a "spillover" effect as to counts 4 and 5 because the evidence in those counts was allegedly weaker than in the count 1 drug offense, such contention is purely speculative. As the People point out in their respondent's brief, "the presence of the guns and ammunition was as equally hazardous to the children [at the residence] as was the presence of the drugs and drug

paraphernalia due to the fact that [the] shed in which the guns and ammunition were stored was easily accessible."

Moreover, the facts underlying the drug and child endangerment counts were not more likely to inflame a jury than any of the firearm charges. Nor was this a capital case, or rendered one because of the joinder of the counts. Thus, as the trial judge impliedly found, Rocha did not meet his burden of showing a " 'substantial danger of prejudice requiring that the charges be separately tried.' " [Citation.] (*Bradford, supra*, 15 Cal.4th at p. 1315.)

Although we find the trial court's denial of Rocha's severance motion proper at the time it was made, "[b]ecause the issue is raised on appeal following trial [and Rocha asserts he was denied a fair trial by the denial of his severance motion], we must also consider whether, 'despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law.' [Citation.]" (*Sandoval, supra*, 4 Cal.4th at p. 174.) In this regard, Rocha's bald assertion of gross unfairness caused by joining strong counts with the alleged weaker counts 4 and 5 fails. He has not demonstrated any actual prejudice from any "spillover" effect of the drug or child endangerment counts resulting from the joinder of the charges for trial. (*Bradford, supra*, 15 Cal.4th at p. 1315.) Because he has not done so, Rocha has failed to show that denial of severance deprived him of due process and a fair trial. (*Sandoval, supra*, 4 Cal.4th at p. 174.)

DISPOSITION

The judgment is affirmed.

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HUFFMAN, Acting P. J.

WE CONCUR:

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O'ROURKE, J.

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IRION, J.